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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, NOVEMBER 16, 2001

PETITION OF

BROADSLATE NETWORKS OF VIRGINIA, INC.

CASE NO. PUC010166

For Declaratory Judgment Interpreting
Interconnection Agreement with Verizon
Virginia Inc. and Directing Verizon
Virginia Inc. To Provision Unbundled
Network Elements In Accordance With
The Telecommunications Act of 1996

PETITION OF

360 COMMUNICATIONS COMPANY OF
CHARLOTTESVILLE D/B/A ALLTEL

CASE NO. PUC010176

For Injunction Against Verizon
Virginia Inc. for Violations of
Interconnection Agreement and for
Emergency and Expedited Relief to Order
Verizon Virginia Inc. to Provision
Unbundled Network Elements In Accordance
With The Telecommunications Act of 1996

ORDER CONSOLIDATING CASES AND
ASSIGNING HEARING EXAMINER

Pursuant to the Procedural Order issued in Case
No. PUC010166 on August 16, 2001, and the Procedural Order
issued August 28, 2001, in Case No. PUC010176, Verizon Virginia
Inc. ("Verizon Virginia"), Broadslate Networks of Virginia, Inc.
("Broadslate"), and 360 Communications Company of
Charlottesville d/b/a ALLTEL ("ALLTEL") filed their respective

responsive pleadings¹ to the captioned Petitions filed in accordance with the Telecommunications Act of 1996 ("Act").²

Broadslate and ALLTEL, both competitive local exchange carriers or "CLECs," seek virtually identical relief in their Petitions against Verizon Virginia.³ The two CLECs each seek interpretation and enforcement through injunctive relief of their respective interconnection agreements with Verizon Virginia. The CLECs allege Verizon Virginia has failed to provide DS-1 and (for Broadslate) DS-3 UNE loops in accordance with their respective interconnection agreements and that Verizon Virginia's unbundling practices allegedly violate § 251(c)(3) of the Act, the Federal Communication Commission's ("FCC") implementing rules, and other applicable law.

Both CLECs complain of Verizon Virginia's charges (special construction and/or other tariffed charges) imposed for the addition of electronics to DS-1 and (for Broadslate) DS-3 UNE loops and transport facilities. Broadslate alleges that this pricing constitutes double recovery of costs because these

¹ Verizon Virginia filed its Answer in PUC010166 and its Answer in Case No. PUC010176 on September 7, 2001. We grant Verizon Virginia's Motion to file Answer one day out of time. Broadslate filed its Reply in Case No. PUC010166 on September 25, 2001, and ALLTEL filed its Reply in Case No. PUC010176 on September 20, 2001.

² Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq..

³ ALLTEL does allege an additional claim that Verizon Virginia has breached the interconnection agreement with ALLTEL by failing to return firm order confirmations ("FOCs") within 48 hours. For reasons given later, we decline to consider this claim.

charges are already included, or should have been included, in Verizon Virginia's rates for unbundled loops and transport under TELRIC pricing.⁴

In addition to petitioning for declaratory relief and enforcement of the interconnection agreements under the Act, both CLECs allege that Verizon Virginia's provisioning of DS-1 and (for Broadslate) DS-3 UNE loops violates its obligations under the Commission's Rules at 20 VAC 5-400-180 F 1, which require Verizon Virginia, in making its interconnection arrangements, to "make available network features, functions, interface points and other service elements on an unbundled basis." 20 VAC 5-400-180 F 2 further requires such arrangements to be made on "a nondiscriminatory basis," which the CLECs allege that Verizon Virginia has not done.

Finally, both CLECs allege that Verizon Virginia has violated the requirement of adopting "best practices" that was imposed in the Commission's Order approving the merger of Bell Atlantic Corporation and GTE Corporation.⁵ Specifically, the parent companies of Verizon Virginia and Verizon South Inc. f/k/a Bell Atlantic-Virginia, Inc. and GTE South Incorporated,

⁴ See Final Order, Exhibit A, issued April 15, 1999, Case No. PUC970005, Ex Parte: *To determine prices Bell Atlantic-Virginia, Inc., is authorized to charge Competitive Local Exchange Carriers in accordance with the Telecommunications Act of 1996* (hereinafter, "UNE proceeding in Case No. PUC970005"). TELRIC means total element long run incremental cost.

⁵ *Joint Petition of Bell Atlantic Corporation and GTE Corporation, For Approval of Agreement and Plan of Merger*, Order Approving Petition, Case No. PUC990100, Final Order, at pp. 8, 14 (November 29, 1999) ("merger order").

respectively, were directed "to give priority to unifying their practices with regard to interactions with [CLECs]." ⁶ The CLECs contend that Verizon Virginia's refusal to add electronics to existing facilities to provision DS-1 and (for Broadslate) DS-3 UNE loops amounted to adoption of one of the worst practices of the former GTE Corporation.

Verizon Virginia answers both CLEC Petitions by denying that it is under a duty to "condition" facilities by attaching needed electronics to loop or transport facilities to carry DS-1 and DS-3 signals. Therefore, Verizon Virginia denies that it has violated any state or federal law in the provisioning of DS-1 and DS-3 UNE loops. Verizon Virginia denies that its provisioning of DS-1 and DS-3 UNE loops is discriminatory or that its pricing is discriminatory. Verizon Virginia raises an affirmative defense that both petitions fail to state a claim for which relief may be granted because all claims are without merit. Verizon Virginia requests that all claims by Broadslate and ALLTEL be dismissed.

The Commission finds that the Petitions of Broadslate and ALLTEL should be investigated further. Accordingly, we will not dismiss either Petition. Nevertheless, the Commission declines to exercise jurisdiction to interpret or enforce the parties' interconnection agreements under § 252 of the Act, as such action might be construed on appeal as a constructive waiver of

⁶ Id. p. 8.

sovereign immunity under the Eleventh Amendment of the United States Constitution, which we are without authority under state law to do.⁷ The parties may pursue interpretation and enforcement of their respective interconnection agreements before the FCC, pursuant to § 252(e)(5) of the Act. Meanwhile, this Commission will investigate whether Verizon Virginia's practices complained of are in violation of other requirements, including state law and the Commission's regulations and/or orders. For the purpose of this investigation, we will consolidate these two cases.

The Commission is concerned by the identical allegations of Broadslate and ALLTEL that Verizon Virginia is engaging in the discriminatory provisioning of DS-1 and (for Broadslate) DS-3 UNE loops. Based upon the pleadings and applicable law, the Commission finds that Verizon Virginia's practices, as they relate to the provisioning and pricing of DS-1 and DS-3 UNE loops to Broadslate and ALLTEL, should be investigated, pursuant to § 56-247⁸ of the Code of Virginia, to determine whether such

⁷ Our explanation declining to arbitrate applies equally to the interpretation and enforcement of interconnection agreements requested herein. "[U]ntil the issue of the Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity" *Petition of Sprint Communications Company of Virginia, Inc., For Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. § 252(b) and Related Arrangements with Verizon Virginia Inc. and Verizon South, Inc.*, Case No. PUC010136, Preliminary Order, p. 2, issued August 8, 2001.

⁸ § 56-247 of the Code of Virginia provides, in pertinent part:

If upon investigation it shall be found that any regulation, measurement, practice, act or service of any public utility

practices and services by Verizon Virginia are unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of law.

Pursuant to 5 VAC 5-20-100 B and 5 VAC 5-20-80 D, the Division of Communications is directed to conduct an investigation into these practices by Verizon Virginia concerning the provisioning and pricing of DS-1 and DS-3 UNE loops. All parties are instructed to cooperate with the Staff's investigation and to respond fully and completely to its discovery within ten (10) business days from receipt.

The Commission now takes judicial notice of the entire record of the UNE proceeding in Case No. PUC970005.⁹ The Commission believes that the cost studies utilized therein may address the appropriate costs included in the Commission-established price for Verizon Virginia's DS-1 UNE loops.

The Commission finds that these consolidated cases should be assigned to a Hearing Examiner to conduct all further

complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of law or if it can be found that any service is inadequate or that any reasonable service cannot be obtained, the Commission may substitute therefor such other regulations, measurements, practices, service or acts and make such order respecting, and such changes in, such regulations, measurements, practices, service or acts as shall be just and reasonable.

⁹ Broadslate bases its cause of action in part upon the pricing of UNE loops, which was done in the UNE proceeding in Case No. PUC970005. Therefore, we may take judicial notice of that record. *Fleming v. Anderson*, 187 Va. 788, 795, 48 S.E.2d 269, 272.

proceedings, consistent with the findings above.¹⁰ The Hearing Examiner should convene a prehearing conference to schedule the prefiling of evidence, including any Staff Report or testimony that Staff elects to present, and to schedule a hearing on the consolidated cases.

Broadslate and ALLTEL have each petitioned for expedited relief. The Commission directs the presiding Hearing Examiner to conduct further proceedings in a reasonably expeditious manner.

Accordingly, IT IS ORDERED THAT:

(1) Case Nos. PUC010166 and PUC010176 are hereby consolidated for further proceedings.

(2) Pursuant to the provisions of 5 VAC 5-20-120 A, a Hearing Examiner is hereby assigned to conduct all further proceedings in these consolidated cases.

(3) An investigation of Verizon Virginia's practices in the provisioning and pricing of DS-1 and DS-3 UNE loops shall be conducted by the Division of Communications, consistent with the findings above.

(4) These consolidated cases are hereby continued.

¹⁰ The Hearing Examiner may make such further rulings on discovery procedures as may be warranted under the circumstances.